Public Prosecutor v Ho Shui Ngen

HIGH COURT (SANDAKAN) — CRIMINAL TRIAL NO S(47)-8 OF 1994
IAN CHIN J
19, 20, 23 JUNE 1995

Criminal Law *— Dangerous Drugs Act (Malaysia) — s 39B(1)(a) — Drug trafficking — Whether a case beyond reasonable doubt had been made out — Whether the accused was in custody or control of the cannabis*

Ho Shui Ngen, the accused, was charged with trafficking 484.2g of cannabis on 13 November 1992 at a flat No S27, 1st floor, Block A14, Sri Taman, Batu 3, Jalan Labuk, Sandakan contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952. The evidence of the prosecution was that two policer officers attended the above premises after receiving a call from the police station that a person had gone amok at the said address. They proceeded to the place and saw the flat was in a mess. An old man opened the door and told the officers that his son, the accused, had gone amok in a room. The room was not closed. The officers entered the room and saw the accused lying on a bed in a slumber state. They saw dried leaves, suspected to be cannabis, on a piece of paper and a plastic bottle on the floor next to the bed. They woke up the accused, showed him the dried leaves. The accused then offered to bribe the officers for not taking action against him. The accused was then handcuffed and taken to the police station. The dried leaves were later confirmed to be cannabis.

Held, discharging and acquitting the accused:

(1) The prosecution had failed to prove that the accused had custody or control of the cannabis and therefore could not rely on the presumption provided by s 37(d) of the Dangerous Drugs Act 1952.

(2) The mere fact that the cannabis was found in the room of the accused does not necessarily prove that the accused had the sole custody or control.

(3) The evidence of the bribe could not be conclusive evidence of guilt, even more so when there was no elaboration as to the circumstances in which the money was offered.

(4) The several items of evidence, arguably pointing to the guilt of the accused, are insufficient to support the verdict of guilty as there were many possibilities as to how the drug came to be in the room and there was doubt as to whether the accused was the sole occupant of the room so as to justify the conclusion that he had sole custody and control.

A [**Bahasa Malaysia summary**

Ho Shui Ngen, tertuduh, telah dipertuduhkan dengan mengedar 484.2g kanabis pada 13 November 1992 di sebuah rumah pangsa No S27, Tingkat Satu, Blok A14, Sri Taman, Batu 3, Jalan Labuk, Sandakan bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya
B 1952. Keterangan daripada pendakwa ialah bahawa dua pegawai polis hadir di premis yang tersebut di atas setelah menerima panggilan daripada balai polis bahawa seorang sedang mengamuk di alamat tersebut. Mereka terus ke tempat itu dan melihat rumah pangsa itu dalam keadaan bersepah. Seorang tua membuka pintu dan memberitahu pegawai-pegawai itu bahawa anak lelakinya,
C tertuduh, telah mengamuk dalam sebuah bilik. Bilik itu tidak ditutup. Pegawai-pegawai itu memasuki bilik itu dan melihat tertuduh berbaring di atas katil dalam keadaan nyenyak. Mereka melihat daun-daun kering, disyakki kanabis, di atas sekeping kertas dan botol plastik di atas lantai bersebelahan dengan katil. Mereka
D mengejutkan tertuduh dan menunjukkan kepadanya daun-daun kering itu. Tertuduh kemudiannya menawarkan untuk memberi rasuah kepada pegawai-pegawai itu untuk tidak mengambil tindakan terhadapnya. Tertuduh kemudiannya digari dan dibawa ke balai polis. Daun-daun kering itu kemudiannya disahkan sebagai kanabis.

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Diputuskan, melepaskan dan membebaskan tertuduh:

(1) Pendakwa telah gagal untuk membuktikan bahawa tertuduh mempunyai jagaan atau kawalan ke atas kanabis itu dan oleh itu tidak boleh bergantung kepada anggapan yang
F diperuntukkan oleh s 37(d) Akta Dadah Berbahaya 1952.

(2) Fakta bahawa kanabis dijumpai di dalam bilik tertuduh semata-mata tidak semestinya membuktikan bahawa tertuduh mempunyai jagaan atau kawalan tunggal.

(3) Keterangan mengenai rasuah tidak boleh menjadi bukti
G konklusif kesalahan, lebih-lebih lagi apabila tidak ada penerangan lanjut mengenai keadaan-keadaan di mana duit itu ditawarkan.

(4) Beberapa perkara keterangan, yang boleh dihujahkan sebagai menunjukkan kesalahan tertuduh, adalah tidak memadai untuk
H menyokong keputusan bersalah kerana terdapat banyak kemungkinan berkenaan dengan bagaimana dadah itu boleh berada di dalam bilik itu dan terdapat keraguan sama ada tertuduh adalah penghuni tunggal bilik itu untuk memberi justifikasi kesimpulan bahawa beliau mempunyai jagaan dan kawalan tunggal.]

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Notes

For cases on Dangerous Drugs Act (Malaysia), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 117–167.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (folld)
Choo Yoke Choy v PP [1992] 2 MLJ 632 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a)

Amir bin Nasaruddin (Deputy Public Prosecutor) for the prosecution.
Francis Wong for the accused.

Ian Chin J:

The charge

Ho Shui Ngen ('the accused') is charged with trafficking 484.2 grams of cannabis on 13 November 1992, at house No S27, 1st floor, Block A14, Sri Taman, Batu 3, Jalan Labuk, Sandakan, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The so-called house was actually a flat. The evidence led by the prosecution is as follows.

The evidence

On 13 November 1992, at about 1.40am, two police officers, Leon bin Magayad ('Leon') and Mejalan bin Lumbet ('Mejalan'), were on patrol duty in a car when they received a call from a police station that a person had gone amok at the said address. They proceeded to the place and was directed there by the signal of a woman on the first floor. They looked through the window of the flat and saw the flat was in a mess and they also saw an old man near the kitchen of the flat. Leon called for the old man to open the door to the flat. The old man was presumably blind because he groped his way to the door to open it. The old man told Leon that his son, the accused, had gone 'amok' and was in a room. Leon and Mejalan entered the room, which door was not closed, and saw the accused lying on a bed. Leon saw dried leaves, which he suspected to be cannabis, on a piece of paper and a plastic bottle on the floor next to the bed. Leon woke the accused up to tell him cannabis was found. Leon then told Mejalan to call Inspector Zaini Yusof ('Zaini'), the investigation officer of the anti-narcotic section of the Sandakan police. It was after this that Leon saw a black plastic bag which he later discovered to contain dried leaves. Leon showed the dried leaves to the accused by which time Mejalan had returned to the flat. The accused then offered RM1,000 to Leon and Mejalan so as not take action against him. The accused was then handcuffed and taken to the car together with the items, including the dried leaves, recovered from the room. They all then went to the police station in Sim Sim where Leon made a police report after contacting Zaini who came and took charge of the exhibits which he took to his office in the police headquarters and locked the same in a cabinet. Zaini, Leon, Mejalan and two other police officers went back to the room in the flat with the accused where Zaini conducted a search and he found a wallet containing a driving licence

and identity card belonging to the accused. He found two bottles adapted for smoking cannabis as well as three small packets of dried leaves. These new discoveries were also taken back by Zaini and kept in his cabinet under lock. The rest of Zaini's evidence dealt with the drawing of a rough sketch of the room which shows the room to have another bed and with his taking and receiving the exhibits from the chemist Lim Kieng Chwee ('the chemist'). Mejalan also testified and his evidence corroborated that of Leon. One other witness who testified was the chemist. From the exhibits which Zaini handed him he took out seven samples weighing a total of 65.87g out of 484.2g and confirmed the material to be cannabis bearing all its morphological features and cannabinoids. It was upon the evidence that I have adverted to that Mr Amir bin Nasaruddin, the learned Deputy Public Prosecutor, submitted that the prosecution had made out a case beyond reasonable doubt. Mr Francis Wong, learned counsel for the accused, argued otherwise and his arguments are as follow.

Whether a case beyond reasonable doubt

Mr Wong submitted that Leon and Mejalan did not corroborate the discovery of more cannabis by Zaini and this casts a doubt on what were actually recovered. Though Leon and Mejalan returned to the flat with Zaini yet they did not see Zaini recovering anything from the room. Though that may lend doubt to whether Zaini did recover any further cannabis, it does not cast any doubt on the fact that the cannabis recovered by Leon was in fact handed to Zaini and later taken to the chemist who examined and analysed the material recovered by Leon and these samples weighed 64.47g.

It was next submitted that the prosecution had failed to establish the accused in custody or control of the cannabis even though it was found in the room of the accused. The negating factors, according to Mr Wong, are the door to the room was not closed, the presence of another bed in the room, the bag containing the cannabis was not hidden and the presence of the old man in the flat all of which cast a doubt as to whether the accused was alone had custody or control. The learned deputy did not reply to these points. A retracing of the events is necessary to consider this argument. Leon and Mejalan were directed to go to the flat supposedly because the accused had gone 'amok' and they reached the flat 20 minutes after receiving the call. But the evidence showed that the accused, instead of then behaving like an 'amok' was asleep and had to be roused from his sleep. Where was the accused before he went into his slumber and who caused the mess in the flat are pertinent questions because they may provide the clue as to whether the accused knew there was a bag under the bed he was sleeping on before he went into a slumber. The old man, who was alleged to be the father of the accused, was not called to give evidence and there is no evidence to explain how the mess was caused and how from being an 'amok' the accused had gone into a slumber. If the accused had been asleep for a long time, someone else could have placed the bag containing the cannabis under his bed. No evidence was led that no one else had

entered the flat during the time the accused was asleep and this is important because the door to the room where the cannabis was found was not even closed let alone locked. It must not be forgotten that the accused was not caught with manual possession of the cannabis. In view of what I have said, the old man in the flat becomes an all important witness because he would be able to say whether the accused had the exclusive occupation of the room since there is evidence to suggest otherwise on account of the presence of another bed in the room. I am of the view, just as the Supreme Court was in *Choo Yoke Choy v PP* [1992] 2 MLJ 632, 637, that the mere fact that the cannabis was found in the room of the accused does not necessarily prove that the accused had the sole custody or control. The old man had access to the room and the cannabis could very well be his, at least there is the probability. It is very important that the old man be called to testify that the cannabis found in the room under the bed was not his and that no one else, other than the accused, occupied the room. Though he cannot see, he can hear. The old man was summoned but the prosecution never called him to give evidence though he was offered to the defence which does not help to close this gap of the case for the prosecution. What about the evidence of the attempted bribe by the accused — is that conclusive of the guilt of the accused? The bribe was offered, after Leon showed and told the accused the bag contained cannabis, 'so as not to take action against him'. Here again, the action of the accused, rather than an indication of guilt, could be that he was confronted with cannabis, which may not necessarily be his, but which the police found in his room and he had to get out of this predicament and hence the attempted bribe. Thus it cannot be conclusive evidence of guilt. This is even more so when there was no elaboration as to the circumstances in which the money was offered such as from where the accused got the money since the accused was alleged to be in a semi-conscious state after being roused from his slumber. No evidence was led as to whether the accused understood Malay and whether Leon spoke to the accused in Malay and what did he speak to him that resulted in the bribe. It is only when the details of these events are revealed that the court will be able to conclude whether the accused in offering the bribe was conscious of his action, since he was alleged to be semi-conscious, and whether it could be conclusively inferred that the bribe indicated the accused knew there was cannabis in the room and he had custody and control of them. No such details were given. In any event, although several items of evidence, which I have adverted to, supra, arguably point to the guilt of the accused they are insufficient, just was the case in *Abdullah Zawawi v PP* [1993] 3 MLJ 1, to support the verdict of guilty as there were many possibilities as to how the drug came to be in the room and there is doubt as to whether the accused was the sole occupant of the room as to justify the conclusion that he had sole custody and control.

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Conclusion

Therefore, I am of the view that the prosecution had failed to prove that the accused had custody or control of the cannabis and therefore

A cannot rely on the presumption provided by s 37(d) of the Dangerous Drugs Act 1952. The prosecution had therefore failed to prove that the accused knew there was cannabis in the room. The accused is discharged and acquitted. The cannabis is to be destroyed in the presence of the Senior Assistant Registrar of the High Court, Sandakan, which destruction is only to take place after the appeal against the decision herein, if any, is disposed off or after the time limited for appeal if there be no appeal.

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Accused discharged and acquitted.

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Reported by Richard Leung

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